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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/814,151	03/21/2001	Gina Lynn Nick	01/700	2473

7590 10/29/2003

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EXAMINER
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GITOMER, RALPH J

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 10/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.  
**09/814,151**

Applicant(s)  
**Nick**

Examiner  
**Ralph Gitomer**

Art Unit  
**1651**



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on Sep 24, 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 21-36 is/are pending in the application.
- 4a) Of the above, claim(s) 30-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

The amendment received 9/24/2003 has been entered and claims 21-36, are currently pending in this application, claims 21-29 are considered here. The amended title and abstract are acceptable.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claim 21-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Yu.

Yu (5,939,395) entitled ~~XX~~Identification of a Potent Antioxidant from Aloe barbadensis~~XX~~ teaches a method of determining antioxidative efficacy of various samples including tocopherol in column 5, lines 30 bridging to column 6. Dichlorofluorescein diacetate is added to an antioxidant sample and incubated in column 5 lines 31-36. The fluorescence intensity of the sample is determined using a spectrofluorometer with an excitation wavelength of 488 nm and an emission wavelength of 525 nm in column 5 lines 36-39. The antioxidative activity was calculated by comparison of the suppression rate of the antioxidant sample with a control in column 5.

All the features of the claims are taught by Yu for the same function as claimed.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 24-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Yu in view of Kelleher.

Yu (5,939,395) entitled "Identification of a Potent Antioxidant from Aloe barbadensis" teaches a method of determining antioxidative efficacy of various samples including tocopherol in column 5, lines 30 bridging to column 6. Dichlorofluorescein diacetate is added to an antioxidant sample and incubated in column 5 lines 31-36. The fluorescence intensity of the sample is determined using a spectrofluorometer with an excitation wavelength of 488 nm and an emission wavelength of 525 nm in column 5 lines 36-39. The antioxidative activity was calculated by comparison of the suppression rate of the antioxidant sample with a control in column 5.

The claims differ from Yu in that they include a promoter of oxidative activity is added.

Kelleher (6,051,571) with a 102(e) date of 7/1996, entitled  
❖Methods for Treating Medical Dysfunctions and Diseases Using  
Furan Nitron Compounds❖ teaches in column 28 Example 18, a  
method for measuring the antioxidative activity of a sample by  
5 the addition of radical generating systems including ferrous iron  
and tert-butyl hydroxide to the sample followed by measurement of  
dichlorofluorescein fluorescence. Ferrous iron results in auto-  
oxidation in the produced free radicals in the form of hydroxyl  
radicals, superoxide anion radicals and hydrogen peroxide in  
10 column 28. Test antioxidant samples were measured for their  
ability to prevent dichlorofluorescein oxidation in a free  
radical generating environment at an excitation wavelength of 485  
nm and emission wavelength of 535 nm in column 28.

15 It would have been obvious to one of ordinary skill in the  
art at the time the invention was made to add the promoter of  
oxidative activity as shown by Kelleher in the method of Yu  
because Kelleher shows the promoter improves the response of the  
indicator which is the same indicator presently claimed. Both  
20 Yu, the present claims and Kelleher employ the same indicator,  
dichlorofluorescein. Therefor one would expect the function of  
the promoter to be the same as described in the present  
specification.

Claims 28-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Yu in view of McLachlan.

Yu (5,939,395) entitled ~~XX~~Identification of a Potent Antioxidant from Aloe barbadensis~~XX~~ teaches a method of  
5 determining antioxidative efficacy of various samples including tocopherol in column 5, lines 30 bridging to column 6. Dichlorofluorescein diacetate is added to an antioxidant sample and incubated in column 5 lines 31-36. The fluorescence  
10 intensity of the sample is determined using a spectrofluorometer with an excitation wavelength of 488 nm and an emission wavelength of 525 nm in column 5 lines 36-39. The antioxidative activity was calculated by comparison of the suppression rate of the antioxidant sample with a control in column 5.

15 The claims differ from Yu in that they are directed to comparing a food based antioxidant to an isolated form of the same antioxidant.

20 It would have been obvious to one of ordinary skill in the art at the time the invention was made to compare any desired antioxidants by the method of Yu because Yu teaches a method of determining antioxidants in general where various components are considered that are found in foods.

The claims further differ from Yu in that claim 28 includes the limitation of using an optical fiber sensor.

McLachlan (4,573,761) entitled ~~W~~Fiber Optic Probe for Sensitive Raman Analysis~~W~~ teaches in the abstract, a fiber optic probe for fluorescence measurements.

It would have been obvious to one of ordinary skill in the art at the time the invention to employ any known spectrophotometric measurements for their known function with the expected result in view of McLachlan who teaches a fiber optic probe for such measurements. No novelty is seen in employing fiber optic probes.

Applicant's arguments filed 9/24/2003 have been fully considered but they are not persuasive.

Applicants argue that the present claims are directed to determining the effectiveness of a nutritional food supplement where Yu is directed to purifying a compound. Kelleher teaches a method of assaying compounds. The cited references do not teach a method of determining the effectiveness of a food supplement.

It is the examiner's position that Yu teaches determining antioxidative efficacy of various antioxidative substances that are well known as food supplements. See the title of Yu. Kelleher was cited to teach a promoter of oxidative activity.

Claims 21-29 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Each of the following applies in all occurrences.

There are a number of instances of lack of antecedent basis such as claim 21 line 1, ~~the effectiveness~~. In claim 21, what the food supplement is effective for is not set forth. In claim 21 ~~specific antioxidants~~ does not state which antioxidants or what they are specific for. In claim 22 line 9, ~~specific antioxidant properties~~ does not state what the properties are nor what they are specific for. Claims 21, 22 and all occurrences are directed to determining the effectiveness of a nutritional food supplement but lack any such step to do so. For example, in claim 22 last line, how the measurements are used is not seen. In claim 28 line 7, ~~a key antioxidant ingredient~~ does not recite what the ingredient is key for.

Applicant's arguments filed 9/24/2003 have been fully considered but they are not persuasive.

Applicants argue that the cited terms have antecedent basis in the disclosure.

It is the examiner's position that it is claims which are rejected in the above rejection and the cited terms lack antecedent basis in the claims. It is noted that compounds do not have capabilities but may have activities.



**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

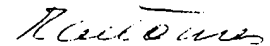
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ralph Gitomer whose telephone number is (703) 308-0732. The examiner can normally be reached on Tuesday-Friday from 8:00 am - 5:00 pm. The examiner can also be reached on alternate Mondays. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone number for this Art Unit is (703) 872-9306. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-1235. For 24 hour access to

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Ralph Gitomer  
Primary Examiner  
Group 1651

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